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Supreme Court, U.S.
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No. 01-131

In The

Supreme Court of the United States

GARY E. GISBRECHT, BARBARA A. MILLER, and NANCY SANDINE,

Petitioners,

vs.

JO ANNE B. BARNHART, Commissioner of Social Security,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether, when determining a "reasonable" attorney fee to be paid by the plaintiff to the plaintiff's attorney pursuant to 42 U.S.C. § 406(b), a court may give no effect to the plaintiff's contract to compensate plaintiff's attorney in terms of a contingent fee taking into account the contingent nature of the fee even when the contingent fee requested is within the statutory limitation of 42 U.S.C. § 406(b) for an attorney fee not to exceed "25 percent of the total of the past-due benefits," even when it is a criminal offense for an attorney to charge a non-contingent fee, and even when the contingent fee sought is consistent with the prevailing market rate.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 238 F.3d 1196 (9th Cir. 2000), and is set out at pages 1-11 of the Petitioners' Appendix (Pet'r App.). The order of the court of appeals denying rehearing and hearing en banc, which is not officially reported, is set out at pages 43-44 of Petitioners' Appendix. The underlying decision of the United States District Court for the District of Oregon in *Gisbrecht v. Apfel*, No. CV-98-0437-RE (D.Or. Apr. 14, 1999), is not published. (Pet'r App. 17-22.) The Magistrate Judge's report and District Court's decision in *Miller v. Apfel*, No. CV-96-6164-AS (D.Or. Mar. 30, 1999), are also unreported. (Pet'r App. 23-32.) The Magistrate Judge's report and District Court's decision in *Sandine v. Apfel*, No. CV-97-6197-ST (D.Or. June 18, 1999), are likewise unreported. (Pet'r App. 33-41.)

JURISDICTION

The judgment of the Ninth Circuit was entered November 27, 2000 and modified for publication on January 22, 2001. (Pet'r App. 1-11.) A timely petition for rehearing and suggestion for rehearing en banc was denied on April 20, 2001. (Pet'r App. 42-43.) The petition for a writ of certiorari was filed on July 19, 2001. On November 26, 2001, certiorari was granted with respect to Petitioners Gary E. Gisbrecht, Barbara A. Miller, and Nancy Sandine (and denied with respect to Petitioner

Donald L. Anderson). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutes are set out in the appendix to this brief.

STATEMENT OF THE CASE

Title II of the Social Security Act provides for old-age, survivor, and disability benefits for insured individuals irrespective of financial need. *See* 42 U.S.C. §§ 402, 423. Insured status is acquired by paying Social Security taxes. 42 U.S.C. §§ 413-414, 416(i). Old-age benefits are the well-known retirement benefits. 42 U.S.C. § 402. Survivors benefits are paid to certain family members of a deceased worker who paid Social Security taxes. *Id.* Disability benefits are paid to insured individuals who meet the statutory definition of disability, i.e., an inability to engage in any substantial gainful activity. 42 U.S.C. §§ 402, 423. The most common disability benefits awarded under Title II are Disability Insurance Benefits (DIB). 42 U.S.C. § 423.[1]

[1] Title XVI of the Social Security Act, a welfare program, provides Supplemental Security Income (SSI) benefits to financially needy individuals who are aged, blind, or disabled regardless of their Title II insured status. An individual may apply for both Title II and Title XVI benefits.

ADMINISTRATIVE PROCEEDINGS

The underlying merits claims of Petitioners Gary E. Gisbrecht, Barbara A. Miller, Nancy Sandine, and Donald L. Anderson[2] involved claims for Title II disability benefits. Gisbrecht applied for DIB in January 1994, stating that he had been disabled since August 1993, due to a closed-head injury sustained when he was struck by a car.[3] Gisbrecht had organic brain damage, a seizure disorder, and anxiety. Miller applied for DIB in March 1993, alleging disability since January of that year. Miller had a cardiac condition for which she had bypass surgery; she also had a bleeding disorder, diabetes mellitus, and some depression.[4] Sandine applied for DIB in July 1993, claiming disability since December 1988. Sandine had peripheral vascular disease with stenosis of the carotid artery, a cervical-spine fusion, degenerative joint disease of the cervical spine, and several other impairments. All claimants asserted and the courts held that they were disabled.

After Gisbrecht's, Miller's, and Sandine's applications were denied administratively both initially and on reconsideration, each requested a de novo hearing before an administrative law judge (ALJ). At their oral hearings before the ALJs, Gisbrecht and Miller were represented by non-attorneys.[5] An ALJ ultimately decided that Gisbrecht had been disabled from August 1993 until January

[2] Certiorari was denied with respect to Petitioner Donald L. Anderson. We will mention Anderson only in passing.

[3] Gisbrecht also applied for SSI.

[4] Miller also applied for SSI.

[5] Sandine had an attorney at her ALJ hearing.

1996, but not thereafter, and thus denied any Title II benefits based on a disability after that date. Other ALJs decided that Miller and Sandine had never been disabled and thus denied their applications entirely. Gisbrecht, Miller, and Sandine exhausted their administrative remedies by requesting review by the Social Security Administration's Appeals Council.[6]

Gisbrecht's, Miller's, and Sandine's requests for Appeals Council review were denied, respectively, in March 1998, April 1996, and June 1997. From application through the Appeals Council, Gisbrecht, Miller, and Sandine spent on average more than three and one-half years exhausting their administrative remedies.

PROCEEDINGS IN THE DISTRICT COURTS

Gisbrecht, Miller, and Sandine had a right to seek judicial review of the administrative denials of their applications for benefits. 42 U.S.C. § 405(g). Each retained a firm comprised of attorneys Ralph Wilborn, Etta L. Wilborn, and Tim Wilborn.[7] Within five months of the filing of the complaints in all three cases, Petitioners'

[6] At the Appeals Council, Gisbrecht was represented by attorney Ralph Wilborn of Ralph Wilborn and Etta L. Wilborn, P.C. In June 1999, the Social Security Administration authorized Ralph Wilborn to collect from Gisbrecht an attorney fee of $2,000 under 42 U.S.C. section 406(a) for work before the Appeals Council.

[7] Ralph and Etta are husband and wife. Ralph and Tim are brothers.

attorneys filed merits briefs explaining why the Petitioners were entitled to benefits.[8]

In *Gisbrecht*, the Commissioner agreed that Gisbrecht's disability did not cease, but continued after January 1996. The merits were resolved entirely in Gisbrecht's favor within seven months of his complaint, with reinstatement of benefits ordered. In *Miller*, the Commissioner opposed a judicial finding of entitlement to benefits; the Commissioner did suggest, however, that the court remand Miller's case for further administrative proceedings. Miller's attorneys opposed such a remand, urging that the court itself award benefits. Six months later, the district judge awarded Miller benefits when she adopted a magistrate judge's report that recommended an award of benefits. In *Sandine*, the Commissioner argued for affirmance, but a magistrate judge recommended that the court find Sandine entitled to benefits. Without further objection, the district judge adopted that recommendation, resolving the merits litigation favorably to Sandine within ten months of the filing of her complaint. The merits litigation in *Gisbrecht*, *Miller*, and *Sandine* was completed on average in about ten months.

As a result of the favorable judgments, Gisbrecht, Miller, and Sandine became entitled to, respectively, $28,366.00, $30,056.00, and $55,952.00 in past-due Title II benefits. (Pet'r App. 19, 30, 33.) In addition to past-due benefits, Gisbrecht, Miller, and Sandine were entitled to

[8] In the District of Oregon, a plaintiff seeking Social Security benefits does not file a motion for summary judgment or a motion for judgment on the pleadings, but instead files a memorandum supporting a petition for judicial review.

continuing Title II benefits until they died, were no longer disabled, or reached retirement age (sixty-five years of age).[9] The Commissioner withheld 25% of the past-due Title II benefits awarded pending a judicial determination of any motion for attorney fees fee pursuant to 42 U.S.C. § 406(b).

After the merits litigation was over in *Gisbrecht*, *Miller*, and *Sandine*, Petitioners' attorneys first moved the district courts to award attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The district courts utilized the lodestar method to calculate the EAJA fees and awarded attorney fees under the EAJA of $3,339.11 (25.08 hours x $133.14 per hour), $5,164.75 (39.91 hours x $129.41 per hour), and $6,836.10 (52.4 hours x $130.46 per hour) in, respectively, *Gisbrecht*, *Miller*, and *Sandine*. (Pet'r App. 17, 27, 33.)

Following the determination by the Commissioner of the amount of past-due Title II benefits, Petitioners' attorneys moved the district courts to award attorney fees under 42 U.S.C. § 406(b), to be paid out of Gisbrecht's,

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[9] The value of any future benefit is related to the monthly benefit. Gisbrecht's monthly Title II benefit in January 1999 was $1,011.00. Gisbrecht was forty-three years old in January 1999 when his past-due benefits were calculated. Miller's monthly benefit in December 1997 was $830.60. Miller was fifty-three years old in July 1998 when her past-due benefits were calculated. (Miller did not need her court case to establish entitlement to future benefits. While her case was pending in court, the agency found her disabled based on a new application.) Sandine's monthly benefit in December 1998 was $898.40. Sandine was fifty-nine years old in February 1999 when her past-due benefits were calculated.

Miller's, and Sandine's past-due Title II benefits. In support of their motions for the section 406(b) fees, Petitioners' attorneys filed three legal memoranda each in *Miller* and *Sandine* and two in *Gisbrecht* and submitted the employment agreements, affidavits from themselves, affidavits from other Social Security practitioners, statistical data regarding the risk of loss in Social Security civil actions, and statistical data regarding the marketplace in Oregon for legal services paid on a contingent-fee basis. (Pet'r App. 44-98.) In *Gisbrecht*, *Miller*, and *Sandine*, the Commissioner filed memoranda opposing, in part, the motions for the section 406(b) fees. In *Miller* and *Sandine*, magistrate judges issued reports recommending paying section 406(b) fees consistent with the Commissioner's arguments. (Pet'r App. 27, 33.) Petitioners' attorneys objected to those reports.[10]

Because there is a dollar-for-dollar offset of any section 406(b) fee against any EAJA fee, if a district court grants a motion for a section 406(b) fee in an amount equal to or less than an EAJA fee, the attorney will not net any additional attorney fee from the section 406(b) motion. All three section 406(b) motions were for that reason unsuccessful. The district courts used the lodestar method to calculate both the EAJA fees and the section 406(b) fees. (Pet'r App. 19, 30, 35.) Because the EAJA awards in *Gisbrecht* and *Sandine* exceeded the section 406(b) lodestar calculations, Gisbrecht and Sandine paid no out-of-pocket section 406(b) fee. (Pet'r App. 17, 22, 33, 40.) In *Miller*, the amount of the section 406(b) lodestar

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[10] In *Gisbrecht*, Petitioners' attorneys' section 406(b) motion was not referred to a magistrate judge.

exceeded the court's EAJA award by only $296.75, so that is the only additional fee the attorneys received by virtue of section 406(b). Gisbrecht, Miller, and Sandine each had agreed to pay his or her attorneys – 25% of past-due Title II benefits or, respectively, for Gisbrecht, Miller, and Sandine, $7,091.50, $7,514.00, and $13,988.00. (Pet'r App. 72-86.) The EAJA and section 406(b) fee litigation in the district courts took on average about nine months to resolve, approximately the same length of time as was required by the merits.

PROCEEDINGS ON APPEAL

Petitioners' attorneys appealed the section 406(b) awards in *Gisbrecht*, *Miller*, Sandine, and *Anderson*[11] to the Ninth Circuit, and the Ninth Circuit consolidated for decision the four appeals. In an unpublished decision on November 27, 2000, the Ninth Circuit affirmed the district courts' section 406(b) awards in all respects. (Pet'r App. 5-11.) The Ninth Circuit reaffirmed that the lodestar method must be used to determine a section 406(b) fee. (Pet'r App. 6.) Further, the Ninth Circuit held that the lodestar method requires the utilization of a specific hourly rate, regardless of whether, in the private marketplace, the prevailing market rate is based on a percentage of the recovery, e.g., 25% of past-due benefits. (Pet'r App. 7.)

On January 22, 2001, the Commissioner's motion to publish the November 27, 2000 decision was granted, and

[11] This Court denied Anderson's petition for a writ of certiorari.

the mandate was issued. Miller, Gisbrecht, Sandine, and Anderson moved the Ninth Circuit to withdraw its mandate and then petitioned the Ninth Circuit for rehearing with a suggestion for rehearing en banc. In an unpublished order on April 20, 2001, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc. (Pet'r App. 43.)

SUMMARY OF ARGUMENT

I. Prior to the enactment of section 406(b), federal courts doubted that they had the authority to review the size of legal fees under contingent fee agreements made by Title II claimants. As a consequence, many of those agreements prior to 1965 required claimants to pay their attorneys 50% of all back benefits awarded.

Congress adopted section 406(b) for the purpose of protecting claimants from "inordinately large fees." The statute does so by imposing a cap of 25%, and by requiring as well that federal courts assure that the amount of fees to be paid within that limitation remains "reasonable".

The reasonableness review mandated by section 406(b) is the same authority that state courts long exercised to assure that contingent fees were not excessive. That traditional reasonableness review fully satisfies the congressional purpose of avoiding inordinately large fees. Congress cannot be assumed to have intended to intrude further into the attorney-client relationship than is necessary to address that statutory purpose or than was traditional in judicial scrutiny of contingent fees.

The lodestar method of calculating fees under fee-shifting statutes is ordinarily necessary because there is no agreement regarding the amount of the fee to be paid to the prevailing party. If, however, a plaintiff and defendant agreed that the fee owed to the prevailing party would be a fixed percentage of the damages awarded, a court would ordinarily accept that agreement rather than engage in a lodestar calculation.

In a Title II case the transactional costs of lodestar litigation would often be unduly burdensome. Title II cases on average involve only about forty hours of legal work on the merits. The additional time and effort required to litigate a disputed lodestar calculation will frequently be quite substantial in comparison. In the instant cases the attorneys sought fees from their clients totaling $13,253.54. The litigation over that dispute required the filing of eleven legal memoranda, a series of affidavits and other documents, lasted nine months, and resulted in five opinions at the district court level alone. The fee litigation was comparable in size and duration to the litigation of the merits.

The traditional and more limited reasonableness review of contingent fees is far more expeditious and appropriate than a lodestar calculation for the small fees typical of Title II cases.

II. At the time when section 406(b) was adopted, federal and state courts routinely and without difficulty considered contingency in determining what fee should be paid to an attorney in the absence of a specific fee agreement. That same methodology can and should be applied to section 406(b).

This Court's decision in *City of Burlington v. Dague*, 505 U.S. 557 (1992), rejected a contingency enhancement only in the context of the type of fee-shifting statute there at issue. Many of the concerns underlying the decision in *Dague* are inapplicable to section 406(b). In a case such as this in which the fee will be paid by the successful client, a contingency enhancement appropriately awards a larger fee against a client whose claim entailed a greater risk of failure.

ARGUMENT

I. WHERE A CONTRACT BETWEEN A TITLE II BENEFICIARY AND AN ATTORNEY PROVIDES THE BASIS FOR DETERMINING THE AMOUNT OF A COUNSEL FEE, THAT CONTRACT-BASED FEE SHOULD ORDINARILY BE APPROVED IF THE COURT CONCLUDES THAT THE FEE IS REASONABLE AND DOES NOT EXCEED 25 PERCENT OF THE PAST-DUE BENEFITS AWARDED

For more than a century courts have supervised the terms of contingent fee contracts, refusing to enforce those agreements to the extent that "the compensation is clearly excessive." *Taylor v. Bemiss*, 110 U.S. 42, 45 (1884). That supervisory power is well established in the state courts, which have generally characterized the controlling question as whether a contract-based fee is "reasonable." These decisions recognize that in any given case there is a range of fees which would be reasonable,[12] and

[12] A member of this Court so observed during the oral argument in *Venegas v. Mitchell*, 495 U.S. 82 (1990). Transcript of

uphold the contract-based amount so long as it is within that range. There has, however, been significant uncertainty as to whether federal courts, in the absence of some express statutory authorization, have a comparable power to review the reasonableness of contingent fee agreements entered into by federal litigants. *See Venegas v. Mitchell*, 495 U.S. 82, 90 (1990).[13]

A distinct question has arisen under more recently adopted federal fee-shifting statutes, which typically authorize the award of a "reasonable" counsel fee to the prevailing party. Because in these cases there is between the prevailing and losing party no contractual agreement governing the size of counsel fees, the court itself must calculate the specific fee to be awarded, rather than merely identifying the range of fees that would be reasonable. This Court has developed a detailed set of legal standards to be applied by the lower courts in making these calculations. *E.g., Hensley v. Eckerhart*, 461 U.S. 424 (1983).

In 1965 Congress adopted section 406(b), which authorizes a court in cases under Title II of the Social Security Act to "determine and allow . . . a reasonable fee for . . . representation, not in excess of 25 percent of the total of the past-due benefits." 42 U.S.C. § 406(b). The central question presented by this case is whether section

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Oral Argument, No. 88-1725, 17 ("there's a vast range of reasonableness").

[13] During the oral argument in *Venegas* members of this Court raised questions about whether federal courts have any such inherent authority. Transcript of Oral Argument, No. 88-1725, 6, 7, 9, 10.

406(b) merely directs federal judges to engage in the traditional review of the reasonableness of a contingent fee agreement, or whether the statute requires federal judges to disregard any such agreement and instead make the sort of de novo determination of fee amounts that has occurred under fee-shifting statutes.

A. Section 406(b) Authorizes Contract-Based Fees As Long As They Are Reasonable

(1) This Interpretation Is Consistent With The Text and History of Section 406(b)

The meaning of section 406(b) can best be understood by reading the terms of the statute in the legal context in which it was enacted. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 528-33 (1994).

Shortly after the adoption of Title II,[14] Congress apparently became aware that applicants for benefits under that program were agreeing to large contingent-fee agreements with attorneys representing them before the Social Security Administration. In 1939 Congress authorized the Administration to "by rule and regulation, prescribe the maximum fees which may be charged" for representation before the agency, and provided that "any agreement in violation of such rules and regulations shall be void." 53 Stat. 1360, 1372. The fees that could be charged for representation in court, however, remained uncontrolled for several decades.

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[14] Title II was first enacted in 1935. *See* http://www.ssa.gov/history/35actinx.html.

By 1965, however, Congress concluded that those fees too should be restricted. It was at that time common for attorneys to negotiate contingent fee agreements under which Title II beneficiaries agreed to pay a fee equal to one-third to one-half of the back award recovered. *E.g., Hopkins v. Cohen*, 390 U.S. 530, 537 (1968) (White, J., dissenting) (pre-section 406(b) agreement for fee of 40%).[15]

The federal courts generally believed that they had no authority to limit such excessive contingent fees, or to resolve fee disputes that arose because of the absence of an express contract between a Title II beneficiary and his or her attorney.

> One view was that courts had no jurisdiction to set a fee for in-court representation and that attorney and client were free to contract as in the case of other litigation. . . . This view sanctioned the contingent-fee arrangements that were (and are) the dominant mode of contract between attorneys and Social Security claimants, and that often provided for fees as high as 50% of accumulated benefits. . . . Another view was that courts had inherent authority to award attorneys fees for work performed before

[15] *E.g., Gardner v. Mitchell*, 391 F.2d 582, 483 (5th Cir. 1968) (50%); *Hopkins v. Gardner*, 374 F.2d 726, 728 (7th Cir. 1967) (40%-50%); *Robinson v. Gardner*, 374 F.2d 949, 951 (4th Cir. 1967) (50%); *Lambert v. Celebrezze*, 361 F.2d 677, 679 (4th Cir. 1966) (50%); *In re Crouse*, 273 F. Supp. 642, 643 (S.D.W.Va. 1965) (50%); *Blankenship v. Gardner*, 256 F. Supp. 405, 409 (W.D.Va. 1966) (50%); *Castille v. Secretary of Health, Educ. and Welfare*, 238 F. Supp. 340, 341 (W.D.La. 1965) (50%); *Sheppard v. Flemming*, 189 F. Supp. 571, 517 (S.D.W.Va. 1960) (40%).

> them. . . . [I]t appears that under either view, a contingent-fee agreement would be honored by the courts. . . .

Webb v. Richardson, 472 F.2d 529, 533 (6th Cir. 1972).[16]

Section 406(b) was enacted to limit the contingent fees which Congress concluded were excessive.

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.

S. Rep. No. 404, 89th Cong., 1st Sess., Pt.1, 122 (1965).[17] The Commissioner correctly explains that "Congress

[16] *See Gonzalez v. Hobby*, 213 F.2d 68, 69 (1st Cir. 1954) (declining to decide on merits motion by beneficiary for judicial determination of fee owed attorney); *Castille v. Secretary of Health, Educ. and Welfare*, 238 F. Supp. 340, 341 (W.D.La. 1965) ("the court will not undertake to regulate or fix the fee. This has been done by the parties themselves"); *Carroll v. Celebrezze*, 228 F. Supp. 24, 24 (N.D.Iowa 1964) (declining to rule on merits of request of counsel to "approve" proposed 33% fee on ground that the court could find no "authority to determine the attorney's fee. . . . It is the court's view that determination of the fee is a matter of agreement between the attorney and his client").

[17] The explanation accompanying the original proposal from the Department of Health, Education, and Welfare for

adopted the fee provision of section 406(b) to prevent abusive fee practices of lawyers in social security cases." (Br. Resp't Opp'n 13.) That congressional purpose is fully satisfied when the court concludes that the fee requested is not "abusive"; nothing in the language or the legislative history of section 406(b) contemplates that the court should go further and select from within the range of non-abusive fees the amount which the judge thinks most appropriate.

The statutory authority to allow a "reasonable" fee was consistent with the traditional role of the courts in supervising counsel fees, a role which carefully distinguished between cases in which the attorney and client had agreed on a fee, and those in which they had not. Where there is a contingent fee agreement, courts will inquire only whether the agreed upon fee is reasonable; if, however, the attorney and client never reached a meeting of the minds regarding the amount of a fee (or a method of calculating the fee), the court itself will set the fee.[18]

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what was to become section 406(b) described in similar terms the problem of "inordinately large fees," and explained that under the language adopted by Congress "claimants would be . . . protected from being charged exorbitant fees." Hearings on H.R. 6675 Before the Senate Finance Committee, 89th Cong., 1st Sess., 513 (1965).

[18] "[T]here is a distinction between the question of the reasonableness of the fee set by a contract between an attorney and his or her client, and the question of the reasonable value of an attorney's services in the absence of an express agreement fixing the amount of his or her compensation. In the absence of an express agreement as to the amount of the attorney's fee, the court or jury must decide on a specific amount within what

Where, as in the case of a contingent fee agreement, the attorney and client agreed upon a fee (or a basis for calculating a fee), state courts traditionally[19] exercised responsibility – which federal courts prior to 1965 doubted they possessed in Title II cases – to ascertain whether the amount of the agreed upon fee was reasonable. The standard for determining whether a contingent fee agreement was enforceable was reasonableness. S. Speiser, Attorneys' Fees (1973), § 2:10, 92-96; 46 Am. Jur. Proof of Facts (Second), 13-31 (collecting cases).

> The percentage of the recovery that the attorney can claim is subject to close scrutiny and is perhaps the most closely monitored aspect of contingent fee contracts. . . . Just because . . . the attorney may receive compensation greater than that otherwise recoverable but for the contingency, a fee will not be deemed unreasonable. . . . [T]he reasonableness depends on the circumstances of the case.

Attorney-Client Fee Arrangements: Regulation and Review, A Report to the Federal Judicial Center, 90-92

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would ordinarily be a range of reasonable fees. In contrast, a finding as to the reasonableness of the fee set pursuant to a contract requires a determination of the upper limit of that range. Thus, judicial decisions as to a reasonable fee in the absence of a contract may be distinguishable from decisions as to the reasonableness of the fee set by a contract." 46 Am. Jur. Proof of Facts (Second) 1, 8 (footnotes omitted).

[19] *E.g., Gair v. Peck*, 6 N.Y. 2d 97, 160 N.E. 2d 43, 49 (1959) ("In the decisions on this subject, of which there are many, it is recognized throughout that there comes a point where the amounts to be received by attorneys under contingent fee contracts are large enough to be unenforcible [sic]").

(1980) (footnotes omitted). The requirement of reasonableness dates at least from the 1908 Canons of Professional Ethics.[20]

Section 406(b) must be interpreted in light of the traditional supervisory role – important but limited – which courts have exercised with regard to assessing the reasonableness of contingent fee agreements. Absent plain language to the contrary, Congress can fairly be assumed to have intended that federal courts only exercise the traditional responsibility for assuring that a contingent fee is not unreasonable in amount.[21] Because Title II claimants will not have separate counsel who might raise any objection to the fee agreement, Congress placed

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[20] Canon 13 provided:

> "A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness."

Currently DR 2-106(b) states that

> "[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."

DR 2-106 includes a list of factors to be used "in determining the reasonableness of a fee", including "[w]hether the fee is fixed or contingent."

[21] The requirement that fees below the cap be found reasonable contrasts with the terms of the International Claims Settlement Act of 1949, which provided with regard to fees below the statutory ceiling (there 10%) that "[w]ritten evidence that the claimant and any . . . attorney have agreed to the amount of the attorney's fees shall be conclusive upon the Commission." 64 Stat. 12, 15.

on the federal courts an affirmative obligation to scrutinize the fee and assure that it is reasonable.[22] That interpretation is entirely consistent with the legislative history of the statute, which evidences a concern to provide the courts with the authority needed to prevent attorneys from collecting fees that are "inordinately large." That statutory purpose is fully satisfied when a court concludes that the fee sought is below the level that would be excessive. Nothing in the text or legislative history of the statute suggests it was the intent of Congress to authorize judges to select from within the range of fees that are *not* "inordinately large" the particular fee that a given judge might think most reasonable.

The language of section 406(b) stands in sharp contrast to other legislation in which Congress had expressly done precisely that, flatly invalidating any fee agreement between the attorney and client and directing the courts to decide de novo what the fee should be. For example, in authorizing the Court of Claims to hear certain claims related to conflicts with Native Americans, Congress provided that

> all contracts heretofore made for fees and allowances to claimants' attorneys, are hereby declared void . . . and the allowances to the

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[22] Several years earlier New York courts adopted a somewhat more complicated scheme, declaring that contingent fees above certain specified levels were "unreasonable compensation" in violation of the Canons of Ethics unless a court had concluded that that higher level was "reasonable compensation." *See Gair v. Peck*, 6 N.Y. 2d 97, 160 N.E. 2d 43, 45-46 n.1 (1959).

> claimant's attorneys shall be regulated and fixed by the court . . . .

26 Stat. 851-54 (1891). Congress used similar language in the Alaska Native Claims Settlement Act of 1971:

> None of the revenues granted by [the Claims Act] shall be subject to any contract which is based on a percentage fee of the value of all or some portion of the settlement granted by this [Act].

43 U.S.C. § 1621(a). By contrast, the terms of section 406(b) do not purport to invalidate fee agreements per se, or to declare them void insofar as they purport to resolve within the range of reasonable fees what fee shall be paid.

The Commissioner contends that Congress envisioned that there would in any given case be only one fee that was reasonable, and directed federal judges to ascertain what that fee was.

> Section 406(b) does not say . . . that counsel will get 25% of the award unless that amount is inequitable and unreasonable. Rather it says that the court will determine *the* "reasonable fee" to be awarded.

(Br. Resp't. Opp'n 13 (emphasis added).) The actual terms of the statute, however, refer to determination of "*a* reasonable fee" (emphasis added) not of "the 'reasonable fee.' " The difference between the articles "the" and "a" is of considerable importance, because it in turn alters the meaning of "determine."[23] The phrase "determine *the*

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[23] The word determine has a number of distinct meanings including "[t]o decide . . . conclusively and authoritatively" and "[t]o . . . ascertain definitely, as after consideration, investigation, or calculation." The American Heritage Dictionary of the English Language, (1969), 359.

reasonable fee" suggests that there is one particular fee that is reasonable, and that the court is to detect what it is. (As in, "the taxi driver will determine the shortest route to DuPont Circle.") On the other hand, the phrase "determine *a* reasonable fee" means only that the court will definitively resolve what the fee is, and that the fee chosen must be reasonable; it does not purport to indicate how the court is to make the choice among the range of fees that would be reasonable. (As in, "the coach will determine which senior will be the team captain.")

A number of lower courts have suggested that Congress would have wanted to preclude any consideration of percentage-based contingent fee agreements because, in their view, the amount recovered in a Title II case is necessarily unrelated to the amount or quality of work done by the attorney. In fact, however, more effective representation can result in a larger award.[24] More importantly, section 406(a)(2) expressly authorizes awards based on contingent fees for legal representation in the administrative process. Under section 406(a)(2), subject to certain exceptions, an attorney will be awarded a fee

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[24] A skilled attorney may increase the amount of benefits by persuading the court to reopen an earlier claim, *e.g.*, *Gonzales v. Sullivan*, 914 F.2d 1197, 1202-03 (9th Cir. 1990); *McGuire v. Sullivan*, 873 F.2d 974, 982 (7th Cir. 1989), to accept an earlier date of onset of disability, e.g., *Vertigan v. Halter*, 260 F.3d 1044, 1054 (9th Cir. 2001), or, as in *Gisbrecht*, by convincing the court that the period of disability lasted longer.

equal to 25% of back benefits, up to a ceiling of $4,000[25], based on "an agreement between the claimant and [the attorney]." Approximately 88% of all fee claims for work in the administrative process are resolved under section 406(a)(2),[26] and the number of claims litigated in that process is far larger than those which reach court. It is difficult to believe that Congress, having expressly approved contingent-fee based awards for work in the administrative process, meant tacitly to bar awards on that very basis for legal work in court.

This argument, moreover, disregards the central congressional purpose in enacting section 406(b). Congress was not primarily concerned with whether the fee awarded was an accurate reflection of the time and skill of the attorney. Had that been its purpose, Congress assuredly would not have imposed a 25% ceiling on fee awards; as this Court has recognized, the fair value of an attorney's work may well exceed the total amount recovered. *See, e.g., City of Riverside v. Rivera*, 477 U.S. 561 (1986). Rather, Congress was animated by a desire to assure that claimants retain a large portion of their

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[25] The ceiling can be increased under section 406(a)(2)(iii). In 2002 the ceiling will be raised to $5,300. *See* http://www.ssa.gov/representation/raisethemax.html.

[26] Social Security's Processing of Attorney Fees: Hearing Before the Subcommittee on Social Security of the House Committee on Ways and Means, 107th Cong., 1st Sess., 9 (2001) ("In 2000, the fees of about 88 percent of all cases involving representation were approved using the fee agreement process") (statement of William C. Taylor, Deputy Assoc. Comm'r, Office of Hearings and Appeals, Social Security Administration).

accrued back benefits. Congress' conclusion that contingent fees of one-third to one-half were "inordinately large" was necessarily based only on the portion of the award left to the claimant; Congress did not purport to have any information or concern regarding whether the resulting fees exceeded the hours expended multiplied by an appropriate hourly rate. A fee agreement which guarantees the claimant that he or she will actually receive 75% of those benefits is manifestly more consistent with that purpose than an agreement which requires the claimant to pay a reasonable hourly rate for time expended regardless of the size of the resulting fee.

The Commissioner objects that if the choice among reasonable fees could be based on the terms of a contingent fee contract, then lawyers could receive different fees despite having provided the same services. (Br. Resp't Opp'n 15-16.)[27] But such a disparity is precisely the result mandated by the express provisions in section 406(a)(2). The uniformity contemplated by section 406(a)(2) is in the proportion of back benefits that is guaranteed to claimants, not in the hourly rates paid to their attorneys.[28]

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[27] Similar disparities would in any event result even under the Commissioner's view of the law, since in some but not all cases attorneys would receive less than the lodestar calculation because of the 25% limitation.

[28] The lodestar method, moreover, does not in practice result in identical awards under similar facts. The application of the multi-faceted lodestar calculation involves a considerable degree of judicial discretion. In *Miller*, for example, Judge Frye awarded Ralph Wilborn only $150 an hour, despite the fact that several other judges in the same district had earlier awarded the

The general language of section 406(b) should be construed in a manner congruent with the more detailed provisions of section 406(a)(2). Section 406(a)(2) controls the amount of the fees awarded in the overwhelming majority of administrative cases. Under section 406(a)(2) a fee will be awarded under the terms of a contingent fee contract (up to 25%, but no more than $4,000) unless the resulting fee would be "clearly excessive for the services rendered" or the attorney failed "to adequately represent the claimant's interest." 42 U.S.C. § 406(a)(3). It would be strange indeed if the contract-based fee awards that are mandatory under section 406(a)(2) were deemed to be impermissible under section 406(b), particularly since those fees might be sought under the same contract for presenting essentially similar arguments.

Such a distinction between the standards under section 406(a)(2) and 406(b) would have a singularly perverse result. If the court in a Title II case concludes the agency has erred, it may either direct the award of benefits or remand the case for further proceedings. A judicial award is a far more favorable outcome for the beneficiary, since it assures the claimant will get benefits (claimants lose about 40% of remands) and avoids the delay of further administrative proceedings. But an attorney who succeeds in winning an outright judicial award may as a consequence receive a substantially smaller legal fee. In the Commissioner's view such a lawyer's section 406(b) fee would be based solely on a lodestar calculation. If,

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same attorney $175 and $200 per hour. (Pet'r App. 24-26; Pl.'s Reply to Def.'s Resp. to Pl.'s Motion for Approval of Attorney's Fees, *Miller*, No. CV-96-6164-AS, Record 55.)

however, the attorney was less successful and the case was only won after a remand, the attorney – in addition to the section 406(b) lodestar based fee – would almost invariably be awarded another contract-based $4,000 fee under section 406(a)(2).[29]

That peculiar result is starkly illustrated by the circumstances of this case. Among cases such as this which are litigated in court, only 6% result in a judicial award of benefits, compared to remands in about 48% of cases.[30] Despite those odds, the attorneys in this case succeeded in winning judicial awards for all three of the claimants. Had the attorneys been less successful, won benefits only after remand, and had fee agreements under 406(a)(2), they would under section 406(a)(2) have received an additional $10,000[31] from their clients. Because, however,

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[29] Although the attorney would only be entitled to a section 406(a)(2) award if he or she also provided legal representation on remand, the award under section 406(a)(2) is not generally based on the amount of legal work done. The full $4,000 award would not be available for work done on remand if an award were also made for work done prior to the court action.

[30] Social Security Advisory Board, Disability Decision Making" Data and Materials (2001), 85, *available* at http://www.ssab.gov/chartbookB.pdf.

[31] In *Gisbrecht* Petitioners' attorney Ralph Wilborn was authorized to collect $2,000 as a section 406(a) fee for work done at the Appeals Council prior to the civil litigation. This authorization would reduce the additional amount the Petitioners' attorneys could have received under section 406(a)(2) if the case had been remanded. If the court had not awarded benefits to Gisbrecht, the attorney would not have sought a section 406(a) fee from the Appeals Council.

no remand was ordered, the total fees paid by the clients under section 406(b) was only $296.75.

(2) *Hensley v. Eckerhart*, 461 U.S. 424 (1983) Does Not Require A Different Interpretation

In the first fifteen years after the adoption of section 406(b), contingent-fee contract-based awards appear to have been the rule. Awards equal to 25% of back benefits were made in approximately half of the reported cases.[32] *E.g.*, *Marion v. Gardner*, 359 F.2d 175, 181 (8th Cir. 1966) (opinion by Blackmun, J.). The leading appellate decision of this era expressly approved contract-based awards so long as the court concluded the fee requested was reasonable. *McKittrick v. Gardner*, 378 F.2d 872, 875 (4th Cir. 1967) ("the court . . . may approve a fee in accordance

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[32] *McCalip v. Richardson*, 460 F.2d 1124, 1130 (8th Cir. 1972) (opinion joined by Justice Clark); *Mitchell v. Weinberger*, 404 F. Supp. 1213, 1219 (D. Kan. 1975); *Rufer v. Richardson*, 345 F. Supp. 583, 585 (D.S.D. 1972); *Hopkins v. Gardner*, 374 F.2d 726 (7th Cir. 1967); *Philley v. Cohen*, 293 F. Supp. 1068, 1072 (N.D.Miss. 1968); *Robles v. Gardner*, 287 F. Supp. 200, 207 (D.P.R. 1968); *Wilson v. Gardner*, 282 F. Supp. 287, 290 (S.D.Ohio 1967); *Gray v. Celebrezze*, 245 F. Supp. 718, 722 (W.D.Va. 1965).

Smaller awards were made in *Edgens v. Richardson*, 455 F.2d 508, 508 (4th Cir. 1972) (16.0%); *Conner v. Gardner*, 381 F.2d 497, 500 (4th Cir. 1967) (20%); *Celebrezze v. Sparks*, 342 F.2d 286, 286 (5th Cir. 1965) (20%); *Burgo v. Harris*, 527 F. Supp. 1157 (E.D.N.Y. 1981) (8.2%); *Little v. Califano*, 462 F. Supp. 575 (W.D.N.C. 1978) (attorney requested 13.3%; court awarded 16.5%); *McDaniel v. Cohen*, 288 F. Supp. 808, 813 (W.D.Va. 1968) (20%); *Pollard v. Gardner*, 267 F. Supp. 890, 909 (W.D.Mo. 1967) (fee limited to 25% of benefits due as of date of court's opinion).

with a contingent fee contract within the statutory maximum if it finds, under all of the circumstances, that the fee is reasonable"). Since 1983, however, a number of circuits have held that fees under section 406(b) must instead be calculated by means of the lodestar methodology used under fee-shifting statutes, believing that contract-based fee determinations are precluded by this Court's decision in *Hensley*, 461 U.S. 424.[33]

But the calculation of the appropriate fee under a fee-shifting statute is entirely distinct from a determination of the reasonableness of a fee agreement.

> [T]here is a difference . . . between the court's role in awarding a fee under [a fee-shifting statute] and in exercising its supervisory power over the bar. . . . The first requires the court to arrive at a figure it considers reasonable; the second requires it to arrive at a figure which it considers the outer limit of reasonableness.

Farmington Dowell Prod. Co. v. Forster Mfg. Co., 421 F.2d 61, 90 (1st Cir. 1969).[34]

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[33] *See, e.g., Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324, 327 (4th Cir. 1989) ("our opinions written before 1983 on the subject of fee allowances for attorneys representing social security claimants should now be read in light of the rules discussed in *Hensley* and *Blum [v. Stenson*, 465 U.S. 886 (1989)]").

[34] *See also Cooper v. Singer*, 719 F.2d 1496, 1504 n.13 (10th Cir. 1983) (en banc) ("in describing a fee as 'reasonable,' the meaning changes as the context shifts. When a court calculates a 'reasonable fee,' it determines a specific figure that represents the court's best approximation of the value of the lawyer's services. When a court reviews the reasonableness of a fee . . . reached by voluntary agreement, it determines whether

Neither *Hensley* nor this Court's subsequent decisions involving fee-shifting statutes bar, or even purport to consider, contract-based fee awards, under section 406(b) or otherwise. *Hensley* and its progeny necessarily announce a detailed method for calculating a specific counsel fee because under a fee-*shifting* statute there will rarely be between the prevailing party's counsel and the losing party any pre-suit contingent fee or other agreement regarding the amount of any counsel fee. Nothing in this Court's decisions, however, suggests that such an agreement, if it existed, would be unenforceable, or that a court would insist upon making and imposing its own lodestar calculation even if the parties and counsel had stipulated in advance to some other figure or methodology. To the contrary, *Hensley* insisted that "[i]deally, of course, litigants will settle the amount of a fee." 461 U.S. at 436. Such a settlement could assuredly be reached before the merits themselves were resolved.

Under *Hensley*, if the parties and counsel stipulated at the outset (or at the end) of the litigation that the defendant, if it lost, would pay a counsel fee of 25%, a

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the fee falls within a range that is neither excessive nor inadequate."); *International Travel v. Western Airlines*, 623 F.2d 1255, 1277 (8th Cir. 1980) ("The role of the court in awarding a reasonable fee under [a fee-shifting statute], and in exercising its supervisory power over the bar by examining contingency agreements between attorney and client, differs greatly"). In *International Travel* the court using a lodestar method awarded $43,089.75 in fees against the defendant; in limiting the amount of the contingent fee which the successful plaintiff was to pay its attorney, the court held that "the outer bounds of reasonableness" was 45% of the treble damage award, $167,718.20. *Id.* at 1276, 1278.

court – at least in the absence of a showing of unconscionability – would enforce that agreement rather than make its own lodestar calculation. Indeed, even in a Title II case the Commissioner does not assert that *she* cannot resolve a fee dispute by settlement. If in the instant litigation the Commissioner had agreed in the spring of 1996 that the fee in these cases (if successful) would be 25% minus any EAJA awards, that would presumably have been accepted by the court. The Commissioner insists, however, that unlike agreements made by any party under a fee-shifting statute, or by the Social Security Administration in a Title II case, agreements made by Title II claimants must be disregarded in their entirety. Nothing in the language of section 406(b) requires such an aberrational result; rather, agreements by Title II claimants may also be implemented by the courts if they conclude that the terms of those agreements are reasonable.

It is, moreover, decidedly anachronistic to insist that a 1965 statute enacted to supervise attorney-client fee arrangements must be governed by this Court's 1983 decision in *Hensley* regarding fee-shifting statutes. Rather, section 406(b) should be construed in light of the similarly phrased provisions of 38 U.S.C. § 1984(g) regarding agreements for fees paid to attorneys who represent successful claimants under the National Service Life Insurance program. Section 1984(g) directs the court to "determine and allow reasonable fees for the attorneys", subject to a cap of 10%. In the years prior to the 1965 enactment of section 406(b), fee awards by courts under section 1984(g) were invariably stated as a percentage of

the insurance award, rather than as a specific dollar amount calculated by any lodestar-like method.[35]

In the context of a section 406(b) fee request, utilization of the lodestar approach effectively substitutes the discretion of the district judge for the agreement of attorney and client. The lodestar methodology does not mandate a single, specific, legally correct fee in a given set of circumstances. Rather, the rates, hours and possible enhancements are all matters of district court discretion. The district judge can in practice select any fee that lies

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[35] *Moss v. United States*, 311 F.2d 462, 463 (2d Cir. 1962) (6%); *United States v. Donaldson*, 246 F.2d 148, 151 (9th Cir. 1957) (10%); *United States v. Myers*, 213 F.2d 223, 226 (8th Cir. 1954) (10%); *United States v. Hendrickson*, 53 F.2d 797 (10th Cir. 1931) (10%); *Mortek v. United States*, 297 F. 485, 490 (E.D.Ill. 1924) (5%); *McGovern v. United States*, 294 F. 108, 111 (D.Mont. 1923) (5%); *Phillips v. United States*, 238 F. Supp. 59, 62 (S.D.Ala. 1965) (10%); *Morris v. United States*, 271 F. Supp. 220, 231 (N.D.Tex. 1963) (10%); *Coleman v. United States*, 209 F. Supp. 432, 433 (E.D.La. 1962) (10%); *Friedman v. United States*, 186 F. Supp. 139, 146 (W.D.Ark. 1960) (10%); *Banks v. United States*, 170 F. Supp. 534, 535-36 (D.Conn. 1958) (10%); *United States v. Smith*, 159 F. Supp. 741, 746-47 (S.D.N.Y. 1958) (10%); *Swart v. United States*, 158 F. Supp. 874, 877 (W.D.Va. 1958) (10%); *Liles v. United States*, 153 F. Supp. 54, 57 (E.D.N.C. 1957) (10%); *Dean v. United States*, 150 F. Supp. 541, 545 (W.D.Okl. 1957) (10%); *Hassey v. United States*, 140 F. Supp. 1, 4 (M.D.Ala. 1956) (10%); *White v. United States*, 123 F. Supp. 869, 871 (W.D.Va. 1954) (10%); *Moran v. United States Veterans' Admin.*, 115 F. Supp. 640, 642 (E.D.Mich. 1953) (10%); *Griffin v. United States*, 115 F. Supp. 509, 519 (W.D.Ark. 1953) (10%); *Burk v. United States*, 85 F. Supp. 93 (D.Pa. 1948) (10%); *Cotter v. United States*, 78 F. Supp. 495, 503 (D.Md. 1948) (8%); *Vaughn v. United States*, 78 F. Supp. 494 (D.Tenn. 1947) (10%); *Sloan v. United States*, 19 F. Supp. 777 (D.S.C. 1937) (10%); *Moragne v. United States*, 16 F. Supp. 1008 (D.S.C. 1936) (10%).

within the range of fees bounded by the fees so high or so low that their selection would be an abuse of discretion.[36] The range of fees among which the district court may choose resembles the range of reasonable fees among which the attorney and client would ordinarily be permitted to select. Once the possibility of an unreasonable, inordinately large fee has been eliminated, transferring that choice from the attorney and client to the judge does nothing to advance the avowed purpose of section 406(b), and imposes serious transactional costs.

B. The Lodestar Method Of Calculating Fees Is Inappropriate In Section 406(b) Cases

The lodestar methodology has been fashioned by this Court to implement the purpose of fee-shifting statutes, and has been framed in light of the circumstances typical of litigation under those laws. Both the purpose of section 406(b) and the circumstances of Title II litigation are in important respects quite different from those of fee-shifting statutes. Application of the traditional lodestar method in these circumstances would lead to a number of incongruous results.

The overarching purpose of section 406(b) is to avoid undue reductions in the amount of back benefits actually received by claimants. If the reasonableness requirement is construed in that light, contract-based fee awards can be scrutinized in a limited manner faithful to the intent of

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[36] *See* Pet'r App. 26 (fee recommended by magistrate judge "was within legal boundaries").

Congress. A mechanical application of the lodestar calculation, on the other hand, would lead to results Congress is unlikely to have intended. In comparison to the traditional judicial scrutiny of the reasonableness of a contingent fee award, the lodestar calculation, while considerably more intrusive, is in several important respects decidedly less flexible.

First, a court in applying the reasonableness limitation under section 406(b) could take into consideration the amount of counsel fees that the claimant was also paying to the attorney under section 406(a) for representation in the administrative process. The 25% cap in section 406(b) applies only to awards for in-court litigation. Fees for administrative representation are subject to a separate 25% cap if sought under section 406(a)(2), and to no cap at all if obtained under section 406(a)(1).[37] Nothing in the lodestar methodology would permit a court, in calculating section 406(b) fees, to consider the existence of a section 406(a) award; the purpose of lodestar calculations is simply to calculate a fair fee for the attorney.

Second, if, as the Commissioner contends, section 406(b) awards are to be calculated using only the traditional lodestar methodology, without regard to any agreement between attorney and client regarding the amount of the fee, that would have to be the case regardless of which party was favored by the fee agreement. On this view, for example, an attorney who promised to charge only $50 an hour, or to seek a fee of less than $500, or to

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[37] Thomas E. Bush, Social Security Disability Practice (2d ed. 2001), v. 2, section 755.

represent the claimant for free, would be entitled (as would a claimant) to disregard that agreement and ask for a substantial lodestar-based fee.[38]

Third, a mechanical application of the lodestar methodology will often mean, as occurred in the instant case, that the claimant will not pay any legal fee at all, a result that simply could not occur in the fee-shifting context. In a substantial number of cases, as here, claimants' attorneys win not only an award of benefits, but also an award of counsel fees under the EAJA. 28 U.S.C. § 2412(d).[39] EAJA awards are paid by the United States, and they reduce dollar-for-dollar the fee the claimant must pay to his or her attorney. 99 Stat. 186. Where, as occurred here, the 406(b) fee is calculated using the lodestar method, and the resulting calculation is lower than the EAJA award, the client pays no fee at all.[40] The avowed purpose of section 406(b) was to protect claimants from having to pay "inordinately large" counsel fees. That purpose manifestly is not served by the outcome in this case, under which claimants who had won more than $114,000 paid a total fee of less than $300. Yet that

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[38] *See McDonald v. Weinberger*, 512 F.2d 144 (9th Cir. 1975) (enforcing contract limiting fee to amount below the statutory maximum).

[39] The hourly rate for EAJA fees is to some degree regulated by statute. 28 U.S.C. section 2412(d)(2)(A); *Pierce v. Underwood*, 487 U.S. 552 (1988).

[40] That result has occurred in a number of other cases. *See, e.g., Rosser v. Chater*, No. CIV 94-CV-5620, 1999 WL 144106 (E.D.Pa. Mar. 15, 1999); *Ott v. Apfel*, 994 F. Supp. 1318 (D.Kan. 1998); *Hall v. Callahan*, No. 96 C 580, 1998 WL 142403 (N.D.Ill. Mar. 24, 1998).

implausible result is mandated by a mechanical application of the lodestar methodology. On the other hand, a court making the narrower but more flexible determination of whether a fee was unreasonable could and would consider how much the client was actually being asked to pay.

The factual predicate on which lodestar calculations are typically based – the existence of an hourly market rate for the type of legal work involved – is absent in a Title II case. The prevailing market rate for an attorney's work is not simply a function of the number of years he or she has practiced. Different prevailing rates will often exist in different fields. Attorneys with a high degree of specialized experience will often make more than general practitioners, but the difference will likely depend on the specialty. No such market assessments, however, are possible for lawyers who specialize in Title II cases. Section 406(b) expressly prohibits attorneys from ever charging clients non-contingent fees for handling such cases. Attorneys often base their hourly rate requests on the rates which they charge their fee-paying clients. *Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984). But a lawyer who only litigates Title II cases will have no such fee-for-service clients.

Because of the unique nature of Social Security cases and litigation, utilization of the lodestar method has had the effect of limiting the types and quality of representation available to claimants. Regardless of the methodology used, the fee award in any single Title II case is typically modest. These cases are usually resolved on

summary judgment; one survey concluded that the average case involved fewer than 40 hours of legal work.[41] Thus an attorney can only derive a meaningful income from Title II cases by handling a steady stream of such litigation. It is clear, however, that most of these cases will be unsuccessful; on average claimants who go to court ultimately prevail about 35% of the time.[42]

Courts attempting to apply the lodestar methodology to Title II cases have fixed an hourly rate based on the prevailing rate for lawyers with a given level of general experience. In this case, for example, the district court concluded in *Sandine* that the median hourly rate in the Portland area for attorneys with four to six years of experience was approximately $125. (Pet'r App. 38.) In order for an attorney handling Social Security cases to actually *earn* an average of $125 an hour, however, the lawyer would have to win all of the numerous cases he or she handled, a virtually impossible task. Although a skilled attorney with substantial experience in Social Security cases will have some ability to pick the stronger

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[41] *Rodriquez v. Bowen*, 865 F.2d 739, 747 n. 4 (6th Cir. 1989); *see also Patterson v. Apfel*, 99 F. Supp.2d 1212, 1214 n. 2 (C.D.Cal. 2000) (collecting cases describing range of hours). The total number of hours claimed here was 25.08 in *Gisbrecht*, 39.91 in *Miller*, and 52.40 in *Sandine*. (Pet'r App. 19, 27, 33.)

[42] Claimants win judicial awards in 6% of cases, and remands in about 48%. Recently an average 60% of all remands ultimately resulted in awards. Disability Decision Making: Data and Materials (Jan. 2001), 85. The proportion of claimants who have been successful on remand has usually been lower. *Wells v. Bowen*, 855 F.2d 37, 45 n.1 (2d Cir. 1988) (*Wells I*).

cases, sure winners will not often be obvious; if the meritoriousness of a case were patently apparent, it would be unlikely that both the ALJ and the Appeals Council would have rejected that claim. An attorney talented enough to win 80% of his or her cases would actually earn on average only $100 per hour. In reality even the experienced Social Security lawyers best able to identify meritorious cases cannot actually earn the hourly rate paid to comparable attorneys with fee-for-service clients.

The prospects for claimants with merely average cases, those with a 35% chance of success, are not encouraging. An attorney who takes these cases, and wins 35% of the time, will actually make an average hourly rate equal to only 35% of the median for lawyers of his or her experience. If the court awards fees, as in *Sandine*, using a median of $125 per hour, these lawyers will earn on average only $44 an hour.[43] Lawyers who are actually able to make the median $125 an hour from paying clients simply will not take such cases. Rather, a type of case which yields only $44 an hour will attract only lawyers who are otherwise making only that lower sum, or who are struggling to find any clients at all. Although there will, of course, be exceptions, lawyers making far less than their peers will often be less able.

Because of the modest size of the fee claim in any single Title II case, the transactional cost of litigating a

[43] *See* Richard A. Posner, *Economic Analysis of Law*, section 21.9 (5th ed. 1998) ("A contingent fee must be higher than a fee for the same legal services paid as they are performed").

disputed lodestar-based claim will at times be prohibitive. The typical Title II case involves only about forty hours of work on the merits; most section 406(b) claims or awards are under $10,000. In *Hensley*, by comparison, the plaintiffs' attorneys had expended 2,557 hours and obtained a fee in excess of $130,000. 461 U.S. at 430, 436. In Title II cases the time and opportunity cost of litigating a lodestar-based claim will often be substantial in comparison to the underlying fee claim itself. Lodestar calculations involve an array of factual issues. At least where the fees are disputed, the moving party may be required to offer affidavits, fee surveys, or other evidence or experts on any of these questions. The same issue may have to be relitigated repeatedly. For example, although federal courts on at least twenty-one prior occasions had awarded attorney Ralph Wilborn $175 or $200 per hour, the Commissioner in *Miller* insisted on litigating the issue yet again, and persuaded the district judge in that case to instead use an hourly rate of only $150.[44]

The amount of time and energy devoted to a lodestar dispute can easily equal those involved in the merits of the underlying litigation, as these cases well illustrate. The fee applications in these cases sought a combined fee (net after EAJA deductions) of $13,253.54, less than 12% of the benefits that had been awarded. In support of those applications Petitioners' counsel filed eight legal memoranda and a number of affidavits and exhibits; attorneys representing the Commissioner filed three additional

[44] Pet'r App. 24-26; Pl.'s Reply to Def's Resp. to Pl.'s Motion for Approval of Attorney's Fees, 6-7, *Miller*, No. CV-96-6184-AS, Record 55.

opposing memoranda. The district judges and magistrates judges wrote a total of five opinions disposing of the disputes. The fee motions were pending for an average of nine months.

Although in fee-shifting cases counsel fees are awarded for the time needed to present a fee claim, the lower courts have not awarded such fees in Title II cases.[45] Thus an attorney who devotes ten hours of work to presenting a section 406(b) claim for forty hours of work will lower his or her effective hourly rate by 20%; if twenty hours of work were required for the fee litigation, the effective hourly rate would fall by 33%. If the attorney has already won an EAJA award, and thus will get no section 406(b) award unless the lodestar calculation is higher than the EAJA award, the section 406(b) award may as a practical matter be denied, rendering the investment of time and expense litigating that claim a complete loss. In most circumstances it makes little economic sense for an attorney to appeal an adverse decision on a section 406(b) motion, however erroneous the decision may be.

These transactional costs have had several significant consequences for Social Security practitioners. *Cf. Jean v. Commissioner, INS*, 496 U.S. 154, 164 (1990) ("If the Government could impose the cost of fee litigation on prevailing parties by asserting a 'substantially justified' defense to fee applications, the financial deterrent that the EAJA aims to eliminate would be resurrected."). First, in the common situation in which a claim has been won on

[45] *See Coup v. Heckler*, 845 F.2d 313, 325 (3d Cir. 1987); *Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324 (4th Cir. 1989).

remand, and the attorney at least is receiving fees under section 406(a)(2), the attorney may not even ask for the section 406(b) fees to which he or she is entitled, at least where a below average number of hours is involved. Second, in cases in which there has been an EAJA award, attorneys may be deterred from seeking a section 406(b) award by the possibility that such a motion will yield no additional fee at all. Third, the willingness of practitioners to file section 406(b) motions depends in part on how frequently agency attorneys oppose such fee applications.

The courts of appeals that have approved contract-based fee determinations have done so in part to simplify the fee litigation process. The Sixth Circuit correctly observed in *Rodriquez*, 865 F.2d 739, that

> [t]he courts as well as the Social Security Administration are sometimes spending almost as much time reviewing and setting fees as they are in dealing with the merits of the benefits determination.

Id. at 746. The Second Circuit correctly concluded that basing approval of fee awards instead on the reasonableness of the request is preferable because

> [i]n each case where the contingent fee is found to be reasonable, based on a general assessment of the fee in relation to the nature of the litigation, the need for complicated calculations, expert evidence, and protracted litigation vanishes.

Wells v. Bowen, 907 F.2d 367, 372 (2d Cir. 1990) (*Wells II*).

C. The District Court In These Cases Did Not Apply The Correct Standards

Although section 406(b) permits an attorney to base a fee application on a contingent fee agreement with the claimant, the statute does not create any presumption in favor of the agreed upon amount. To the contrary, because section 406(b) requires an affirmative judicial finding that the fee allowed is "reasonable," the attorney bears the burden of persuasion that the statutory requirement has been satisfied.

The court to which such a fee application is made should affirmatively assess the specific considerations enumerated in section 406(a)(3): whether the fee requested is "clearly excessive" and whether the attorney has adequately represented the claimant's interest. Such matters often will already be within the knowledge of the judge who resolved the merits of the case. Determination of the upper limit of the range of reasonable fees should be a simpler and usually less contentious undertaking than making a lodestar calculation; there would, for example, be no occasion to litigate whether the appropriate hourly rate for a given attorney was $150 rather than $175. In addition, the court should consider whether delay by the attorney has in any way contributed to the size of the back award, and, if so, reduce the award accordingly. *Cf.* 28 U.S.C. § 2412(d)(1)(C). Any contingent fee agreement may fairly be construed not to envision that an attorney's own delays would increase the fee paid by the client.[46] The court may consider as well any other

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[46] *See Rodriquez*, 865 F.2d at 746-47.

matter that bears on the reasonableness of the fee requested.

In assessing the reasonableness of the amount of the fee request, the court should consider the total amount that the claimant is actually being asked to pay out of the back benefits. Thus if a fee award under section 406(a) has been made (or is foreseeable), especially to the same attorney, the court might well find unreasonable the payment of an additional fee equal to 25% of the original, but now diminished, award. Conversely, if because of an EAJA award the attorney is asking that the claimant pay a fee that will be substantially less than the 25% to which the claimant agreed, that circumstance will weigh in favor of a finding of reasonableness. Absent unusual circumstances (such as ineffective assistance), a court could not conclude that the largest fee that would be reasonable for the claimant to pay is no fee at all.

The decisions of the district court in this case did not purport to proceed in this manner. None of those decisions undertook to address the statutory issue of whether the fee requested was within the range of reasonableness. Rather, in each instance the district court – as required by Ninth Circuit precedent – made its own lodestar calculation of the proper amount. (Pet'r App. 19, 29, 35.) But the fact the fee requested was larger than the lodestar calculation does not of course mean that that fee was unreasonable within the meaning of section 406(b). On remand the Commissioner may choose to contend that the amount of one or more of the fees requested under section 406(b) was clearly excessive and thus unreasonable, but that manifestly was not the issue decided by the district court.

II. IN LODESTAR-BASED FEE CALCULATIONS UNDER SECTION 406(b) THE COURT SHOULD CONSIDER THE CONTINGENT RISK PRESENTED BY THE CASE

If this Court concludes that fee awards under section 406(b) must always be based on a judicial calculation of the fair market value of the legal representation, that calculation should be made in a manner consistent with what was in 1965 the established method of fixing such a fee in the absence of a controlling contractual agreement.

Where a client has a contractual obligation to pay a legal fee, but the client and attorney have not agreed on the amount of the fee (or the method of calculating it), the courts have relied on a widely accepted set of criteria for determining the appropriate fee. *See* S. Speiser, Attorneys' Fees, §§ 8.4-8.21 (1973). Although many of those criteria overlap the factors approved by this Court in *Hensley* and its progeny, pre- (and post-) 1965 caselaw generally held that the courts should award a higher level of compensation where an attorney was only entitled to payment if the litigation was successful.

> The fact that an attorney's employment is undertaken on a contingent basis is a proper factor to be considered in assessing a reasonable compensation for his services, the courts generally taking the view that a larger fee will be authorized where its payment depends upon the attorney's success than where he is to be paid whether or not his efforts are successful.

Speiser, Attorneys Fees, v. 1, 319; *see id.* 319-20 n.56 (collecting cases). Prior to 1965, an attorney who had represented a Title II claimant would, in the absence of a

specific contractual agreement, have been entitled to a "reasonable" counsel fee, and a court determining that fee would have awarded a larger amount if the client had only agreed to pay the attorney if the case were won. *United States v. Anglin and Stevenson*, 145 F.2d 622, 630 (10th Cir. 1944). "[W]ell known difficulties and delays in obtaining payment of just claims . . . justifies a liberal compensation in successful cases, where none is to be received in case of failure." *Taylor v. Bemiss*, 110 U.S. 42, 45 (1884). Nothing in the text or legislative history of section 406(b) suggests that Congress intended to depart from this prevailing view of what would be a reasonable fee.

In *City of Burlington v. Dague*, 505 U.S. 557 (1992), this Court declined to authorize a contingency enhancement under fee-shifting statutes. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 717-22 (1987) (plurality opinion). *Dague* was explicitly and solely about the fee-shifting context and did not purport to establish a rule for other types of statutes. The propriety of a contingency enhancement depends on the purpose and context of the specific statute at issue. *See Underwood*, 487 U.S. at 572-73.

> [T]he considerations that led [this Court] to limit the use of risk-enhancement factors "under the usual fee-shifting statutes" . . . are inapplicable in the SSA context, where the award of attorney's fees is predicated on a pre-existing, consensual agreement between the attorney and the client. . . . The SSA fee provision itself recognizes that fee arrangements in this area of practice typically are based on a percentage of any

> past-due benefits ultimately received by the client. Given that reality, and the very real prospects of failure inherent in this field of practice, any reasonable fee must reflect the risks of loss and nonpayment.

Wells I, 855 F.2d at 45 (footnote omitted). Even after *Dague* the courts of appeals have been in agreement that some sort of contingency enhancement is appropriate under 406(b). *See, e.g., Allen v. Shalala*, 48 F.3d 465, 460 (9th Cir. 1995).

Many of the considerations that led to the holding in *Dague* are absent in a section 406(b) case. The primary purpose of fee-shifting statutes is to assure the availability of counsel to plaintiffs who seek to enforce statutes which Congress considered of particular importance. *Hensley*, 461 U.S. at 429. A contingency enhancement may not be necessary to accomplish that end. Section 406(b) was adopted for a very different purpose. Title II claimants already had attorneys; section 406(b) was adopted to assure that the attorneys already representing such claimants did not collect "inordinately large" legal fees.[47] That purpose is fully (indeed excessively) served by reducing a fee to a level in accordance with then prevailing legal standards, standards which expressly considered contingency. Not surprisingly, in the years immediately following adoption of section 406(b) it was the position of the Commissioner and the Department of Justice that the

[47] Section 406(b) also ensures that attorneys are paid by certifying payment of attorney fees out of past-due benefits.

contingent nature of section 406(b) fees warranted a higher level of compensation.[48]

One problematic aspect of a contingency enhancement under a fee-shifting statute is that it would impose a larger fee on defendants with the strongest (albeit ultimately unsuccessful) justification for their actions. Because in such cases there would be a high degree of risk that the suit would be unsuccessful, a greater enhancement would be warranted. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. at 725. Under section 406(b), however, there is no such perverse result. Because under section 406(b) the prevailing party pays the fee, it is the claimants with the more difficult (and thus riskier) cases who will, appropriately, pay a larger fee.

Although the denial of a contingency enhancement may generally reduce the willingness of attorneys to handle cases where success (and thus payment) are uncertain, under many statutes in which fee-shifting awards are authorized other considerations may compensate for this problem. The attorney might negotiate a contingent-fee agreement which may result in a fee larger (possibly much larger) than the lodestar calculation. *E.g., Venegas v. Mitchell*, 495 U.S. 82, 84 (1990) (lodestar award of $75,000; contingent fee award of $406,000). Some clients will be able to pay the attorneys on a fee-for-service basis, so that the lawyers will receive (at least some) compensation

[48] Brief for the Defendant-Appellant, *Webb v. Richardson*, No. 71-2010 (6th Cir.), 27 ("the fact that the fee is contingent is a relevant consideration").

regardless of the outcome of the case.[49] Precisely because fee-shifting provisions have been adopted by Congress to assure enforcement of laws of particular public importance, there will at times be charitable legal organizations willing and able to provide counsel without any assurance of compensation. Such ameliorating factors are rarely present in Title II cases.

Although Ninth Circuit precedent permits a contingency enhancement in a very limited number of cases, the standard applied by the courts of that circuit differs substantially from the type of enhancement that was established law when section 406(b) was enacted. At common law the contingency enhancement existed across the board, except perhaps in unusually easy cases. In the Ninth Circuit, on the other hand, enhancement is only permitted for cases which involve an unusually high degree of risk.[50] Because on average Title II lawsuits are ultimately successful in only about 35% of all cases, a Title II claim involving an unusually high degree of risk would be one with perhaps only a 10% chance of success. To the extent that the Ninth Circuit rule increases the availability of counsel, it does so only in cases which will almost all be lost, while providing no such incentives, for

[49] Such retainers are routine in individual employment discrimination cases.

[50] *Widrig v. Apfel*, 140 F.3d 1207, 1210 (9th Cir. 1998); *Straw v. Bowen*, 866 F.2d 1167, 1170 (9th Cir. 1989) ("unusually risky" case); *see* Pet'r App. 9 n.3.

example, for cases with a 50% (in Title II an above average) probability of success.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

Section 206(b) of the Social Security Act, 42 U.S.C. § 406(b), provides, in pertinent part:

(b) Attorney fees

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

. . . .

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

Section 206(a) of the Social Security Act, 42 U.S.C. § 406(a), provides, in pertinent part:

(a) Recognition of representatives; fees for representation before Commissioner of Social Security

(1) . . . The Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter, and any agreement in violation of such rules and regulations shall be void. Except as provided in paragraph (2)(A), whenever the Commissioner of Social Security, in any claim before the Commissioner for benefits under this subchapter, makes a determination favorable to the claimant, the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim.

(2)(A) In the case of a claim of entitlement to past-due benefits under this subchapter, if –

(i) an agreement between the claimant and another person regarding any fee to be recovered by such person to compensate such person for services with respect to the claim is presented in writing to the Commissioner of Social Security prior to the time of the Commissioner's determination regarding the claim,

(ii) the fee specified in the agreement does not exceed the lesser of –

(I) 25 percent of the total amount of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title), or

(II) $4,000, and

(iii) the determination is favorable to the claimant, then the Commissioner of Social Security shall approve that agreement at the time of the favorable determination, and (subject to paragraph (3)) the fee specified in the agreement shall be the maximum fee. The Commissioner of Social Security may from time to time increase the dollar amount under clause (ii)(II) to the extent that the rate of increase in such amount, as determined over the period since January 1, 1991, does not at any time exceed the rate of increase in primary insurance amounts under section 415(i) of this title since such date. The Commissioner of Social Security shall publish any such increased amount in the Federal Register.

(B) For purposes of this subsection, the term "past-due benefits" excludes any benefits with respect to which payment has been continued pursuant to subsection (g) or (h) of section 423 of this title.

(C) In any case involving –

(i) an agreement described in subparagraph (A) with any person relating to both a claim of entitlement to past-due benefits under this subchapter and a claim of entitlement to past-due benefits under subchapter XVI of this chapter, and

(ii) a favorable determination made by the Commissioner of Social Security with respect to both such claims, the Commissioner of Social Security may approve such agreement only if the total fee or fees specified in such agreement does not exceed, in the aggregate, the dollar amount in effect under subparagraph (A)(ii)(II).

(D) In the case of a claim with respect to which the Commissioner of Social Security has approved an agreement pursuant to subparagraph (A), the Commissioner of Social Security shall provide the claimant and the person representing the claimant a written notice of –

(i) the dollar amount of the past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) and the dollar amount of the past-due benefits payable to the claimant,

(ii) the dollar amount of the maximum fee which may be charged or recovered as determined under this paragraph, and

(iii) a description of the procedures for review under paragraph (3).

(3)(A) The Commissioner of Social Security shall provide by regulation for review of the amount which would otherwise be the maximum fee as determined under paragraph (2) if, within 15 days after receipt of the notice provided pursuant to paragraph (2)(D) –

(i) the claimant, or the administrative law judge or other adjudicator who made the favorable determination, submits a written request to

the Commissioner of Social Security to reduce the maximum fee, or

(ii) the person representing the claimant submits a written request to the Commissioner of Social Security to increase the maximum fee. Any such review shall be conducted after providing the claimant, the person representing the claimant, and the adjudicator with reasonable notice of such request and an opportunity to submit written information in favor of or in opposition to such request. The adjudicator may request the Commissioner of Social Security to reduce the maximum fee only on the basis of evidence of the failure of the person representing the claimant to represent adequately the claimant's interest or on the basis of evidence that the fee is clearly excessive for services rendered.

(B)(i) In the case of a request for review under subparagraph (A) by the claimant or by the person representing the claimant, such review shall be conducted by the administrative law judge who made the favorable determination or, if the Commissioner of Social Security determines that such administrative law judge is unavailable or if the determination was not made by an administrative law judge, such review shall be conducted by another person designated by the Commissioner of Social Security for such purpose.

(ii) In the case of a request by the adjudicator for review under subparagraph (A), the review shall be conducted by the Commissioner of Social Security or by an administrative law

judge or other person (other than such adjudicator) who is designated by the Commissioner of Social Security.

(C) Upon completion of the review, the administrative law judge or other person conducting the review shall affirm or modify the amount which would otherwise be the maximum fee. Any such amount so affirmed or modified shall be considered the amount of the maximum fee which may be recovered under paragraph (2). The decision of the administrative law judge or other person conducting the review shall not be subject to further review.

(4) Subject to subsection (d), if the claimant is determined to be entitled to past-due benefits under this subchapter and the person representing the claimant is an attorney, the Commissioner of Social Security shall, notwithstanding section 405(i) of this title, certify for payment out of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) to such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title).

The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), as amended provides, in pertinent part:

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases

sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

. . . .

(2) For the purposes of this subsection –

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the

party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);. . . .

Further, the EAJA further provides, in pertinent part:

(b) Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.

Pub. L. 99-80, § 3, 99 Stat. 186, amending Pub. L. 96-481.